Supreme Court, U.S.
FILED
06-138 JUL 24 2006
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

DWAIN LEE KIRKLAND,

Petitioner,

v.

RUBY P. KIRKLAND,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

---

PETITION FOR A WRIT OF CERTIORARI

Dwain Lee Kirkland
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706.788.3158
Pro se
Counsel of Record

Counsel for Petitioner

QUESTIONS PRESENTED

1. May a party to a civil suit, in this case a Proponent to a Will, be granted Summary Judgment when it is not valid as a matter of law; when the only evidence presented by the party were four affidavits of a very general nature regarding "influence" while the opposing party had made very specific allegations regarding "Fraud" in two depositions and an extensive affidavit citing to both the depositions and the record; when three out of four of the affiants had been accused of fraud in the Caveat; when two of the four affiants had possibly committed fraud that was recorded in the Res Gestae of the case; when a witness had, under oath in an affidavit, questioned the credibility of all four affiants; when a witness had, under oath in an affidavit, stated that he felt two of the four affiants had committed multiple acts of perjury while under oath in a previous hearing; when the Proponent brought forth no evidence of any kind including the affidavits to rebut two of the allegations of fraud made by a witness in his depositions and affidavit; when the opposing party was due a Summary Judgment as a Matter of Law.

2. May a party to a civil suit, in this case a Caveator to a Will, be denied a Summary Judgment when it is due him as a Matter of Law; when the Proponent's very general affidavits regarding "influence" did not meet much less rebut the Caveator's very specific allegations regarding "Fraud"; when Proponent brought forth no evidence of any kind including affidavits to rebut two of the allegations of fraud made by a witness in his depositions and affidavit; when the Caveator was due a Summary Judgment as a Matter of Law.

3. May a trial court judge decide issues of the credibility of witnesses in a hearing on Summary Judgment.

4. May a state appellate court decide issues of the credibility of witnesses in an appellate review of a lower court ruling.

5. May a state appellate court decide issues of the credibility of a witness based on apparent discriminatory practices illegal under The Civil Rights and Americans with Disabilities Acts.

6. Has the Supreme Court of Georgia continually for the past forty years overturned jury verdicts and other final judgments regarding Caveats to a Will based on its supposition of the credibility of certain witnesses, chiefly

those of a Proponent to a Will, when the Trier of Fact may have made its decision based solely on the lack of credibility of those same witnesses. Is credibility not a Genuine Issue of Material Fact to be decided only by the Trier of Fact--in this case, and most often in these cases--a jury.

7. May an appellate court require an appellant to file a petition for relief, in this case a Motion to Stay the Remittitur, with a concise statement of matters to be raised on appeal to the Supreme Court of the United States, at the same time as a Motion for Reconsideration when the state appellate court's own misconduct in its failure to subsequently grant reconsideration--due to its own possible discriminatory practices--is a possible matter to be appealed. In other words, the Supreme Court of Georgia's failure to reconsider based on the grounds of possible errors made by that court, as contained in the Motion for Reconsideration, is evidence of the misconduct of that court.

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Constitutional and Statutory Provisions:

U.S. Const. art. VI, cl. 2
U.S. Const. Amendment V
U.S. Constitution Amendment XIV, Section 1
42 USCS § 12101 Congressional Findings and Purposes
42 USCS § 12102 Definitions
O.C.G.A. (Official Code of Georgia Annotated) 9-11-56 Summary Judgment
Rule #61 of the Supreme Court of Georgia

* * * * * * * *

Other Authorities:

Corpus Juris Secundum

OPINIONS BELOW

The was no written opinion of the Supreme Court of Georgia. The Judgment affirmed without written opinion under Rule 59 (App., infra, 4a) is unreported. The Judgment of the Trial Court (App., infra, 3a) is attached. The judgment of the Probate Court (App., infra, 1-2a), is attached.

JURISDICTION

The state court of last resort in this case is the Supreme Court of Georgia. Their final judgment was entered on March 27th, 2006. A timely Motion for reconsideration and rehearing was denied on April 25th, 2006. The jurisdiction of this Court is invoked under
28 USCS § 1257. State courts; certiorari. In relevant part:

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari where…any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of…the United States.

(June 25, 1948. ch 646, § 1, 62 Stat. 929; July 29, 1970, P. L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590; June 27, 1988, P. L. 100-352, § 3, 102 Stat. 662.)"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the U.S. Constitution, the Supremacy clause, provides in relevant part:

"[T]he Laws of the United States…shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment V to the U.S. Constitution provides in relevant part:

"[N]or be deprived of life, liberty, or property, without due process of law…"

Amendment XIV, Section 1 to the U.S. Constitution provides in relevant part:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Disabled Americans Act, in relevant part:

"42 USCS § 12101 Congressional Findings and Purposes
(a) Findings
...
(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;
(b) Purpose
...
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment...in order to address the major areas of discrimination faced day-to-day by people with disabilities.
(July 26, 1990, P. L. 101-336, § 2, 104 Stat. 328.)"

"42 USCS § 12102 Definitions
As used in this act:
...
(2) Disability. The term "disability" means, with respect to an individual--
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual..."

O.C.G.A. (Official Code of Georgia Annotated) 9-11-56 Summary Judgment is reproduced at App., infra, 6-7a.

Rule #61 of the Supreme Court of Georgia is reproduced at App., infra 8a

STATEMENT

A. Court Rulings Below

As to the Probate Court ru[illegible]n this case, I believe it was in part based on prejudice towards the Caveator that came about via Fraud on the Court and Extrajudicial Communications by Proponent's attorney. Had I been more experienced, I would have demanded a jury trial and recused the judge. I was denied Due Process of law.

As to the Trial or Superior Court ruling, I believe it was part prejudice and part ignorance. The judge apparently has a habit of not reading the motions or the briefs and relying solely on Oral Argument. He was also very angry and contemptuous of me in the first hearing on Discovery issues. I believe this was a sign of prejudice of an extrajudicial nature. This prejudice then combined with an apparent ignorance of the law, the case (the seals were intact and unbroken on Caveator's depositions at the time of appeal), and legal reasoning resulted in the ruling. I believe I am far from a poor lawyer though not an attorney at law. Yet I lost 19 out of 20 legal arguments in his court room. Four days after this judgment was entered I filed for recusal based on a pattern of conduct. The motion was not timely entertained by the judge and jurisdiction was lost to the Georgia Supreme Court upon timely Notice of Appeal. Had I been more experienced, I would have recused the judge immediately upon any indication of Extrajudicial Prejudice. I was denied Due Process and the right to a trial by jury in this court.

As to the ruling of the Supreme Court of Georgia, it was just a matter of process. There was nothing whatsoever I could have done to avoid it. In my Motion for Reconsideration, I listed all the possibilities as to how that court might have erred, including Discriminatory Prejudice. The motion was not heard but simply denied. I believe that the Supreme Court of Georgia in its conduct and denial of the motion was simply relying on the idea that I would not, could not petition this court for review or that my Petition for Certiorari would be denied. They appear to fear no correction of any kind. They also appear to run on a self-professed mandate to preserve Wills at any cost, even the denial of Due Process and Equal Protection to the Caveator. This mandate appears to have gone far, far beyond a fair reading of the law. I will take it up further in a more specific statement on Question #6 below. The backbone of this however is the court's longstanding practice of using its own prejudices to decide the

credibility of certain witnesses. I was denied Due Process, Equal Protection and the Right to a Jury Trial by the Supreme Court of Georgia.

B. Facts of the Case

The Will is that of A. Leon Kirkland dated Dec. 5th, 1998. The News Media in a directed way is alleged to have committed "fraud of any kind to the injury of the heirs at law" regarding Dwain Lee Kirkland and Sheila Kirkland Meadow Ady, the son and daughter of A. Leon Kirkland, in relation to certain counseling practices known as Scientology®. The Wife of A. Leon Kirkland, Ruby P. Kirkland, is alleged to have committed in a misdirected way "fraudulent practices upon the testator's fears" and "fraud of any kind to the injury of the heirs at law" regarding certain counseling practices known as Scientology®. Sheila Kirkland Meadow Ady, the daughter of the testator is alleged to have committed in a directed way "fraudulent practices" and "fraud of any kind" regarding Dwain Lee Kirkland and his supposed intent to take an executor's fee from the 1985 Will of A. Leon Kirkland. Kelly and Chris Tamplin, the grand daughter-in-law and the grandson of A. Leon Kirkland are alleged to have committed in a conspiratorial and directed way "fraudulent practices" and "fraud of any kind" regarding Dwain Lee Kirkland and Sheila Kirkland Meadow Ady, the son and daughter of A. Leon Kirkland, in relation to certain counseling practices known as Scientology®. The Tamplins are also alleged to have committed in a directed way "fraudulent practices" and "fraud of any kind" regarding the alleged wasteful spending practices of Dwain Lee Kirkland. The preceding fraudulent activities resulted in mistakes of fact about all the heirs at law and possible beneficiaries to the Will other than Kelly and Chris Tamplin. Kelly Tamplin is also alleged to have engaged in "similar acts" and "fraudulent schemes" regarding the Estate Tax return of A. Leon Kirkland, Terroristic threats directed at the Caveator and Tortious Interference with a litigation settlement contract between the Proponent and Caveator. Chris Tamplin is also alleged to have engaged in "similar acts" regarding Terroristic Threats directed at the Caveator and Tortious Interference with a litigation settlement contract between the Proponent and Caveator. The Tamplins and Sheila Kirkland Meadow Ady are also alleged to have committed 20 to 30 counts of Perjury during the course of the Probate Court hearing of 06/17/2004.

C. Question #1

I have found no cases State or Federal regarding a specific allegation being

offset by a general rebuttal. A clear statement on this issue could be made by this court.

Lower Federal jurisdictions have held that persons accused of Fraud and those who claim under them accused of fraud may not be favored by Summary Judgment. It is a common sense approach since those persons, even in Will cases, may simply commit further Fraud via Perjury as it appears happened in this case. This court might wish to mandate that no Summary Judgment can be had in these cases, as a matter of Public Policy, as it is an area ripe for denial of Due Process of law via Perjury as apparently, as I stated above, happened in this case.

Other Federal jurisdictions have held that persons whose credibility has been questioned may not receive Summary Judgment. This is another area ripe for possible mandate.

Proponent having brought forth no evidence on two of the counts is a settled issue both State and Federal. The Caveator/Petitioner, even though a nonmoving party, should have received Summary Judgment in his favor.

All of the issues above affect Due Process and were first brought to bear in the Trial Court hearing of September 21st, 2005 regarding Proponent's Motion for Summary Judgment.

I will provide Citations of Authority for the above in any subsequent brief.

D. Question #2

It is merely a recap of Question #1 emphasizing those issues that fell most heavily in favor of the Caveator/Petitioner and should have resulted, even though a nonmoving party--both the Supreme Court of Georgia and Federal jurisdictions have held to this point--in a Summary Judgment in favor of the Caveator/Petitioner.

As to a nonmoving party, in relevant part:
"Summary judgment can be granted to nonmoving party provided that grant is proper in all other respects." Golston v. Garigan, 245 Ga. 450, 265 S.E.2d 590 (1980); Eiberger v. West, 247 Ga. 767, 281 S.E.2d 148 (1981).

These issues affect Due Process and were first raised in the Trial Court hearing of September 21st, 2005 regarding Proponent's Motion for

Summary Judgment.

I will provide further Citations of Authority for the above in any subsequent brief.

E. Question #3

This comes about due to the Trial Court Judge's not having broken the seals on the Caveator/Petitioner's depositions. The Caveator/Petitioner's Affidavit may not have been read either as it cited heavily to the Depositions. It would appear that the Trial Court judge decided the credibility of a witness and then decided not to consider the testimonial evidence of that witness. The Supreme Court of Georgia itself has held that an Appellate Court may not consider the credibility of a witness in a Summary Judgment. I'm sure the same goes for a trial court judge. This behavior along with possible Extrajudicial Communication and its resulting Prejudice is a violation of Due Process.

The above issue was raised in argument before the Supreme Court of Georgia on March 14th, 2006.

I will provide Citations of Authority for the above in any subsequent brief.

F. Question #4

This question was answered by the Supreme Court of Georgia itself in Miller v. Douglas, 235 Ga. 222, 219 S.E.2d 144 (1975). In relevant part:

"[A]ppellate court cannot consider credibility of witnesses or their affidavits, and a jury must resolve the question...."

And yet it seems impossible that the Supreme Court of Georgia did not disregard all the Caveator/Petitioner's evidence based on credibility. There was simply too much Documentary and Testimonial evidence. As a matter of fact, it seems the Supreme Court of Georgia did not issue a written opinion as there was simply too much evidence to deny. It seems this miscarriage of justice was intentional and just one in a chain of many where Due Process was denied based on the personal prejudices of the members of the court. The only time opposing counsel scored a point in Oral Argument was when he mentioned the religious affiliation of the witness/Petitioner. It would appear that the disability of the

witness/Petitioner may have been a factor as well. In summation, two of the three lower courts decided credibility of witnesses based on prejudice.

The above issues were raised in a Motion for Rehearing and Reconsideration and a Motion to Stay the Remittitur before the Supreme Court of Georgia.

G. Question #5

Question #5 is simply a recap of the issues of Question #4 with emphasis on the reasons for the prejudice as put directly to the Supreme Court of Georgia in Caveator/Petitioner's Motion for Reconsideration and to Stay the Remittitur.

Within the Civil Rights Act of 1964, I have found no appropriate language regarding religious discrimination in a state court proceeding. Protection would then appear to be invoked by the power of this court to enforce the Fourteenth Amendment.

As regards the discriminatory practices of the Supreme Court of Georgia and my disability, I am at this time fully disabled and suffering from Post Traumatic Stress Disorder as a result of child abuse. Proponent's attorney, in the Probate Court proceeding, apparently had a psychological report done on my Interrogatories and then gave that information to the judge in an Extrajudicial Communication, one of the violations of Judicial C ıon I mentioned above. I attempted to discover the name and particulars of the Expert Witness, as well as any pertinent documents, in the Superior Court case that followed. The judge who handed down the judgment in that case twice blocked my efforts by granting Motions for Protective Order. This was enumerated as error on appeal. It was also touched on by myself in Oral Argument before the Supreme Court of Georgia. My disability was an issue that came squarely before the justices in that court. In regards to that, I give you the **Disabled Americans Act**, in relevant part:

"42 USCS § 12101 Congressional Findings and Purposes
(a) Findings
...
(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political

powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(b) Purpose

...

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment...in order to address the major areas of discrimination faced day-to-day by people with disabilities.
(July 26, 1990, P. L. 101-336, § 2, 104 Stat. 328.)"

"42 USCS § 12102 Definitions
As used in this act:

...

(2) Disability. The term "disability" means, with respect to an individual--
(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual..."

In regards to the power to enforce the Fourteenth Amendment as stated in 42 USCS § 12101, I give you a quotation from *Corpus Juris Secundum* :

"Congress has the power to enforce provisions of the Fourteenth Amendment against persons representing the state whether they act in accordance with their authority or misuse it."

This is enunciated in Ramirez v. Puerto Rico Fire Service, 715 F.2d 694 (1st Cir. 1983), in relevant part:

"[T]he 1974 amendment to ADEA was adopted pursuant to Congress' power under enforcement provisions of the Fourteenth Amendment..."

This court has the power to intervene on behalf of the Petitioner to enforce the Congressional intent of the Disabled Americans Act.

These issues as well as Fifth Amendment Due Process and Fourteenth Amendment Equal Protection were raised verbatim in both Caveator/Petitioner's motions before that court: for Rehearing and Reconsideration and to Stay the Remittitur.

H. Question #6

Question #6 is perhaps the root of all evil so to speak. The Supreme Court of Georgia has repeatedly since at least 1963 decided issues of credibility in exercise of its jurisprudence regarding Caveats to Wills. As an example, I give you in relevant part Crews v. Crews, 219 Ga. 459, 134 S.E.2d 27, (1963), a case often cited by Proponent's counsel in the above-styled case:

"The positive testimony of the subscribing witness Russell and of the others who gave their opinion as to the mental condition of the testatrix at the time the will was executed, that she did have the necessary testamentary capacity, was not overcome by the nonexpert witnesses, whose opinions were based upon facts from which the legal conclusion that the testatrix did not have the required testamentary capacity could not be drawn, testifying on behalf of the caveators. Such evidence was insufficient to overcome the positive testimony of those who observed her at the moment the will was executed."

The "positive testimony" was apparently not very positive. The jury voided the will.

Just how on earth does the Supreme Court of Georgia know that the jury in that case accepted the testimony of "subscribing witness Russell" and "the others" as credible. They do not. It is a supposition on the part of the court. The jury in Georgia is not polled at that stage of the game. Perhaps they should be charged on Testamentary Capacity and deliberate and reach a verdict on whether Proponent proved the issue of Testamentary Capacity. It is after all a Genuine Issue of Material Fact. How does the Supreme Court of Georgia know that the Will was not rejected by the jury based solely on the idea that money was involved, oftentimes a great deal of money, and the subscribing witnesses may have had reason to lie and in fact did.

That was 1963.

Move forward to 2004 and we have the same thing happening again in

Holland v. Holland, 277 Ga. 792, 596 S.E.2d 123, (2004), another case often cited by Proponent's counsel in the above-styled case, even cited by the Caveator till he saw the flaws in it. In relevant part:

"[T]the attorney who prepared the will testified Edd wanted the changes made in order to prevent one of his sons from influencing his mother to 'fritter away' the estate."

In further relevant part:

"The only evidence regarding Edd's knowledge of the content of his will was the testimony of the attorney who drafted the will. He testified Edd came to his office several times to work on the will and on the day the will was executed, he read the will to Edd and explained the meaning of each provision. To oppose that direct evidence, appellees offer only conjecture. 'There was no evidence that the [testator] did not know the contents of the will, and the above-stated testimony established that [he] did.' Whitfield v. Pitts, 205 Ga. 259, 270 (53 SE2d 549) (1949)."

Established it to whom, the jury. They voided the will.

Here again the Supreme Court of Georgia has found "the attorney who prepared the will" in first quotation and "the attorney who drafted the will" in second quotation, the Testator's attorney in other words, to be a totally credible witness. An Appellate court should never in its process suppose that any witness is credible or not credible. That's the job of the jury. How on earth does the Supreme Court of Georgia know that the jury accepted his testimony as credible. They do not. As far as they know, the jury may have felt this attorney was the biggest scallywag in ten counties. He may have had one eye but that one eye was continuously shifty.

To get right to the point, juries most often decide one single issue and that issue is credibility of the witnesses. Oftentimes their sole mission is to decide who is lying and who is not.

And they do that.

And then the Supreme Court of Georgia comes along and overturns the verdict.

As I stated above, the Supreme Court of Georgia has a self-professed mission in this vein. It is cited in Holland v. Holland. In relevant part:

" 'To set aside a will and thus deprive a person of the valuable right to make a will, a stringent standard must be met.' Kendrick-Owen v. Clanton, 271 Ga. 731,732 (524 S.E.2d 237)(1999)."

The Supreme Court of Georgia has now and since 1999 raised the bar of proof to a "stringent standard" when the only possible fair reading of the laws of Georgia would yield that it may be proved as any other civil case: - by a Preponderance of Circumstantial Evidence. Indeed, Crews v. Crews, Supra, states this. Indeed as well, a mere reading of the written opinion in Holland v. Holland, Supra, yields, in my opinion, the Preponderance of Circumstantial evidence of Undue Influence necessary to void the Will. And only a jury can decide when Circumstantial evidence has reached a Preponderance. It is a Genuine Issue of Material Fact.

And the jury decided it. And then the Supreme Court of Georgia overturned the verdict.

In summation, the Supreme Court of Georgia has erred mightily and in the process has deprived countless persons of Due Process, Equal Protection and Trial by Jury.

Respectfully, I say to you that it's high time this came to an end.

Issues of credibility of witnesses were first raised in the Trial Court hearing of September 21st, 2005 on Proponent's Motion for Summary Judgment.

I. Question #7

This rule of the Supreme Court of Georgia appears to violate the normal common law rules of pleading where to each pleading there is a response and the pleader may then gauge the response and replead. It appears to violate Due Process as the pleader must work from the position of an

unknown. In this case, numerous errors were possible. They were all put forward in the Motion for Reconsideration and Rehearing. It was only after all these possibilities were ignored and the motion denied that the Appellant/Petitioner could ascertain that the ruling was based on pure prejudice.

Prejudice towards persons of a lesser class appears to be the mandate behind the mission of the Supreme Court of Georgia. Indeed they may exercise any prejudice, sitting an appellate case as if it was a bench trial. Their prejudice in favor of lawyers and against lay witnesses is often seen easily in their rulings. Other prejudices are easily apparent as well.

In this case, the denial of a written opinion, a subject which was brought up in the Motion for Reconsideraton, shows the casual and dismissive way in which they may decide to treat certain persons.

In this case, religious affiliation and disability appear to be their grounds

Issues of Discriminatory Practices by the Supreme Court of Georgia were first raised in the Motion for Reconsideration before that court.

J. Other Relief

The Petitioner requests, where and if possible, Mandamus relief for Caveators as a class and others as a whole.

REASONS FOR GRANTING THE PETITION

The issues presented are of a recurring nature and of great practical and humanitarian importance to the people of the state of Georgia and possibly other states where the same sort of practices may have crept in.

An opinion on the merits may allow this court to issue important mandates on Summary Judgment, Caveats to Wills, and discriminatory practices directed at the disabled.

The decision below is simply incorrect and most appalling of all appears to be based on discrimination and prejudice.

At the very least the court below has erred and in that process injured the

constitutional rights of a great many people.

Below I will speak to things of a more personal nature.

CONCLUSION

The Petition for a writ of certiorari should be granted.

On a more personal note, the persons offended are oftentimes in grief and then are grieved further by the malevolent actions of others, and then may receive justice at the hands of their fellow man only to have it ripped away by a prejudiced court. These people are normally not rich and are made even less so by having their inheritance stolen. In one such case, an only child was deprived of an inheritance by three "friends" of the father. They may even squander their life savings on a jury trial only to have that verdict overturned by the court above.

And last but certainly not least, the late Widow Trevice Holland may have breathed her last breath thinking there was no justice in this land.

In closing, the good people of the state of Georgia call on you to deliver us from this valley of the shadow of death, this evil.

Respectfully submitted.

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Pro se
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Counsel for Petitioner

July 2006

APPENDICES

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MADISON COUNTY
PROBATE COURT
2004 JUL 9 AM 11:15
(Stamped)

IN THE PROBATE COURT FOR MADISON COUNTY
STATE OF GEORGIA

IN RE: Estate of A Leon Kirkland) Estate No. 0204-3572

**ORDER DENYING CAVEAT,
GRANTING PROBATE OF WILL IN SOLEMN FORM
AND APPOINTING ESTATE EXECUTOR**

THIS MATTER CAME ON TO BE HEARD BEFORE ME on June 17,2004. Ruby Kirkland, Proponent, appeared personally and through counsel of record; Caveator Dwain Kirkland appeared *pro se.*

Findings of Fact and Conclusions of Law

Ruby Kirkland is the widow of A Leon Kirkland, deceased. She filed a Petition to Probate Will in Solemn Form, seeking to be appointed executor of the estate. Dwain Kirkland, son of the decedent, filed a caveat to the will and an objection to Ruby Kirkland's appointment. The basis of the caveat and objection was undue influence and fraud.

IT APPEARING TO THE COURT that attorney E.R Lambert, who drew up the will in issue, knew the decedent professionally and personally for over twenty (20) years; that each time the decedent sought estate planning advice he traveled alone; that although the decedent provided for grandchild Chris Tamplin and not other grandchildren, Chris Tamplin lived with the decedent until he was eleven (11) years old and was given gifts by decedent throughout his life;

IT FURTHER APPEARING that although several witnesses' testimony was heard there were very few comments concerning influence over the decedent.

WHEREFORE, the Court finds no evidence of undue influence or fraud. It does find the will to be valid and admits the same to probate in solemn form. Further, Ruby Kirkland is hereby appointed Executor of the estate of A. Leon Kirkland. The caveat filed by Dwain Kirkland is overruled.

SO ORDERED this 8th day of July, 2004.

(Signed)

Donald Royston
Probate Judge, Madison County Probate Court

IN THE SUPERIOR COURT OF MADISON COUNTY
STATE OF GEORGIA

RUBY P. KIRKLAND	)	
Proponent,	)	
v.	)	CIVIL ACTION FILE NO. 04-MV-968-H
	)	
DWAIN LEE KIRKLAND,	)	
Caveator.	)	

FINAL ORDER

The propounder's Motion for Summary Judgment having come before this Court for hearing and after consideration of the Affidavits of Ruby Kirkland, Roy Lambert, Chris Tamplin, and Kelly Tamplin, and after considering the other evidence of record in the case and after considering the arguments of counsel for propounder, and arguments by the caveator, it is the Order of this Court that there is no genuine issue as to any material facts and the propounder is entitled to judgment as a matter of law,

IT IS HEREBY ORDERED that the propounder's Motion for Summary Judgment is granted and the caveator's Motion for Summary Judgment, to the extent that it may be properly before the Court, is hereby denied, and the propounder is entitled to probate the Last Will and Testament of A. Leon Kirkland and to proceed with the administration of his estate.

SO ORDERED this 26th day of September, 2005.

(Signed)

The Honorable Thomas L. Hodges, III
Judge
Superior Court of Madison County
State of Georgia

In the Supreme Court of Georgia

Decided: MAR 2 7 2006
(Stamped)

S06A0497. KIRKLAND v. KIRKLAND

PER CURIAM.

The judgment of the court below is affirmed without opinion pursuant to Supreme Court Rule 59.

Affirmed without opinion. All the Justices concur.

SUPREME COURT OF GEORGIA

Case No. S06A0497 Atlanta, April 25, 2006

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

DWAIN LEE KIRKLAND v. RUBY P. KIRKLAND

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia. Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk

9-11-56. Summary judgment.

(a) *For claimant.* A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and proceedings thereon.* The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.

(d) *Case not fully adjudicated on motion.* If on motion under this Code section judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of affidavits; further testimony; defense required.* Supporting and

opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters, stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. All affidavits shall be filed with the court and copies thereof shall be served on the opposing parties. When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(g) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.

(h) *Appeal.* An order granting summary judgment on any issue or as to any party shall be subject to review by appeal. An order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34. (Ga. L. 1966, p. 609, § 56; Ga. L. 1967, p. 226, § 25; Ga. L. 1975, p. 757, § 3.)

Rules of the Supreme Court of Georgia:

RULE 61. STAY OF REMITTITUR. Any party desiring to have the remittitur stayed in this Court in order to appeal to, or seek a writ of certiorari in, the United States Supreme Court shall file in this Court a motion to stay the remittitur with a concise statement of the issues to be raised on appeal or in the petition for certiorari. Such notice shall be filed at the time of filing a motion for reconsideration or, if no motion for reconsideration is filed, within the time allowed for filing the same. See Rule 27.

A stay of remittitur will not be granted by this Court from the denial of a petition for certiorari.